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In the Supreme Court of the United States

OCTOBER TERM, 1982

ZAPATA-HAYNIE CORPORATION AND HARTFORD INSURANCE COMPANY, PETITIONERS

v.

SUNNY G. WARD, WIDOW OF JOHN D. WARD, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a fish spotter pilot who died when his aircraft crashed in navigable waters was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 684 F.2d 1114. The opinion of the Benefits Review Board (Pet. App. A-10 to A-38) is reported at 14 Ben. Rev. Bd. Serv. (MB) 74. The decision and order of the administrative law judge (Pet. App. A-39 to A-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1982. The petition for a writ of certiorari was filed on September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer

in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of -

(1) A master or member of a crew of any vessel * * *.

STATEMENT

John D. Ward was employed as a fish spotter pilot by petitioner Zapata-Haynie Corporation. Ward was killed in the course of his regular employment on September 11, 1978, when his land-based Cessna 172 aircraft crashed into the Mississippi Sound, two miles off the Mississippi Gulf Coast (Pet. App. A-2 to A-3, A-11, A-44 to A-45, A-49). Ward's regular duties consisted of flying his aircraft over the Gulf of Mexico to locate schools of menhaden fish. Upon spotting a school, Ward would contact one or more of petitioner's fishing vessels by radio, instructing them how to locate the school and how to pull, spread and close their nets in order to catch the fish (*id.* at A-3, A-11, A-49 to A-50). Ward was under the supervision of a land-based chief spotter pilot; he received no instructions from the captains of the vessels and was neither physically aboard nor permanently assigned to any particular vessel (*id.* at A-14, A-50). During winter months and in inclement weather, Ward's spotting duties were performed by a fishing vessel crew member, in the traditional manner used prior to the advent of the spotter pilot (*id.* at A-11, A-12, A-50).

Respondent Sunny G. Ward, widow of the deceased, was awarded state workers' compensation benefits (Pet. 4). Respondent then filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The administrative law judge (ALJ) awarded compensation to the respondent, finding that Ward was an "employee" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3), who sustained injury on a covered situs under Section 3(a) of the Act, 33 U.S.C. 903(a) (Pet. App. A-51).

Petitioners Zapata-Haynie Corporation and Hartford Insurance Company appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board by a divided vote reversed the ALJ, with each member specifying a different legal ground for the decision. Board Member Kalaris concluded that Ward was excluded from the coverage of the LHWCA because he was a "member of a crew of any vessel" (33 U.S.C. 902(3); Pet. App. A-13 to A-14). Board Member Smith concurred on the theory that Ward was not engaged in "maritime employment" and thus failed to meet the status test of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. A-16). Board Member Miller dissented, concluding that the status and situs requirements of the LHWCA were met (33 U.S.C. 902(3) and 903(a)) and that Ward was not excluded

from coverage as a "member of a crew of any vessel" (33 U.S.C. 902(3); Pet. App. A-19).[1]

Respondent sought review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c). The Director, Office of Workers' Compensation Programs, supported respondent's petition for review. The court of appeals granted the petition and reversed the decision of the Board (Pet. App. A-1 to A-9). The court explained that prior to 1972, the test for coverage under the LHWCA "was simply whether the employee suffered injury on navigable waters" (*id.* at A-3 to A-4). In 1972, however, Congress amended the Act to add a status test: coverage now hinges upon whether a worker is engaged in "maritime employment" (33 U.S.C. 902(3)) at the time of his or her injury upon a covered situs (33 U.S.C. 903(a)). The court

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[1]Board Member Miller concluded that "since the decedent would have been covered under the Act prior to the 1972 amendments because he was injured over pre-1972 amendment navigable waters, the decedent is covered by the Act under the 1972 amendments" (Pet. App. A-21). The dissent also reasoned that "even if it is assumed that a claimant who would have been covered prior to the 1972 amendments to the Act is now covered under the 1972 amendments only if he was engaged in 'maritime employment,' it is clear that the decedent met this test" (*id.* at A-23). Ward was engaged in "maritime employment" because his duties bore " 'a realistically significant relationship to maritime activities involving navigation and commerce on navigable waters' " (*id.* at A-26).

of appeals held that both the status and situs tests were met in this case (Pet. App. A-4 to A-6).

The court of appeals noted that the Fifth Circuit had recently concluded en banc "that a person required to work on navigable waters and who would consequently have been covered by the pre-1972 LHWCA is still covered" (Pet. App. A-4, citing *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1038 (5th Cir. 1982) (en banc), petition for cert. pending, No. 82-605). The court reasoned that Ward was injured upon navigable waters because "[e]mployees who * * * were 'on' vessels when injured or killed have always been held to be on the navigable waters" (Pet. App. A-5). Because Ward therefore would have been covered under the pre-1972 LHWCA, the court concluded that he retained coverage under the amended Act. In enacting the 1972 amendments, "Congress did not intend to remove * * * [persons previously covered under the Act] from LHWCA coverage" (*id.* at A-4). "[B]ecause of that congressional intent * * * employees injured on water during the course of their employment [meet] both the situs and status tests" (*ibid.*).[2]

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[2]The court of appeals rejected petitioners' argument that 33 U.S.C. 902(3) sets forth a definitive list of the occupations that qualify as "maritime employment" under the Act (Pet. App. A-6). See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-78 n.7 (1979).

The court of appeals alternatively found that Ward met the more restrictive "maritime employment" test announced by the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (1975), cert. denied, 429 U.S. 868 (1976). Under that approach, an employee is engaged in "maritime employment" if his work activities possess "a realistically significant relationship to maritime activities involving navigation and commerce" (Pet. App. A-6). The court concluded that Ward's employment satisfied that test because it involved a traditional maritime activity that, prior to the advent of the airplane, was performed by a crew member aboard the fishing vessel (*ibid.*).[3]

ARGUMENT

The court of appeals correctly resolved the LHWCA coverage issue in this case. As the court concluded, a fish spotter pilot who would have been covered prior to the 1972 amendments to the LHWCA retained coverage under the amended Act. The court also correctly held that coverage

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[3]The court of appeals also rejected the argument that Ward was excluded from LHWCA coverage as a "member of a crew of any vessel" (33 U.S.C. 902(3) and 903(a)). The court noted that, because seamen's unions prefer Jones Act recovery rather than coverage under the LHWCA, the "master or member of a crew" of any vessel is excluded from LHWCA coverage (Pet. App. A-8). That exclusion, however, does not extend to Ward because "a plane is not a vessel under the Jones Act" (*id.* at A-8 to A-9). Accord, *Smith* v. *Pan Air Corp.*, 684 F.2d 1102, 1112 (5th Cir. 1982).

was appropriate under the more restrictive "navigation and commerce" test applied by the Ninth and Second Circuits. See, e.g., *Weyerhaeuser Co.* v. *Gilmore, supra; Churchill* v. *Perini North River Associates,* 652 F.2d 255 (2d Cir. 1981), cert. granted sub nom. *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (argued Oct. 4, 1982). Because of this alternative ground for the court's ruling, the decision below does not conflict with the decision of any other court of appeals and further review by this Court is unwarranted.[4]

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[4]Petitioners argue that opinions from the First, Second, Third, Fourth and Ninth Circuits conflict with the decision below (Pet. 10-11). The Second and Ninth Circuits, as noted above, have adopted the "navigation and commerce" test for maritime employment. The court of appeals found that Ward satisfied this restrictive test (Pet. App. A-6). Contrary to petitioners' contention (Pet. 10), the Fourth Circuit is in agreement with the court below, having adopted the position "that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." *LeMelle* v. *B.F. Diamond Construction Co.*, 674 F.2d 296, 298 (1982), petition for cert. pending, No. 81-2362. *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981), and *Dravo Corp.* v. *Banks*, 567 F.2d 593 (3d Cir. 1977), cited by petitioners as being in conflict with the decision below (Pet. 10), considered whether certain entirely land-based employments have a sufficient maritime nexus to merit LHWCA coverage. They are, therefore, inapposite to the instant case.

Petitioners' contention (Pet. 10) that the court's decision in the instant case is at odds with its earlier ruling in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir.

1. Petitioners' first three contentions can be collapsed into a single issue: whether a worker injured upon actual navigable waters who would have been covered under the original LHWCA retains that coverage under the amended Act. The court of appeals correctly resolved this issue, which is currently before this Court in *Director, OWCP* v. *Perini North River Associates, supra.*

As explained by the court below, the 1972 amendments to the LHWCA replaced the traditional situs test of the original Act with a two-part situs and status standard. 33 U.S.C. 902(3) and 903(a). As fully discussed in the Director's brief in *Perini* (at 18-24),[5] Congress moved the coverage of the Act shoreward in 1972 to include workers who were injured on broadly defined "navigable waters" adjacent to the water's edge. 33 U.S.C. 903(a). The "maritime employment" status test was necessitated by the expanded geographical scope of the amended Act. With the Act's newly expanded situs "[i]t became necessary to describe affirmatively the class of workers Congress desired to compensate."

1978), cert. denied, 442 U.S. 909 (1979), is without merit. The court below concluded that its decision was fully consistent with *Thibodaux* (Pet. App. A-7 to A-8). Furthermore, to the extent *Thibodaux* conflicts with the decision below, it has been overruled by the subsequent en banc decision in *Boudreaux* v. *American Workover, Inc., supra.*

[5]A copy of the government's brief in *Perini* has been served on petitioners and respondent Ward.

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249, 264 (1977). The legislative history unambiguously demonstrates, however, that the status test was not intended to withdraw coverage from traditionally covered employees injured on actual navigable waters. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 16 (1972). The indisputable congressional purpose behind the 1972 amendments was to expand coverage "to protect additional workers" (*id.* at 1). The "maritime employment" status test does not exclude "employees traditionally covered" (*id.* at 16).

The decedent in this case clearly would have been a covered employee prior to the 1972 LHWCA amendments. See *Nalco Chemical Corp.* v. *Shea*, 419 F.2d 572, 574 (5th Cir. 1969) (per curiam) (pilot salesman killed in course of regular duties when plane crashed while traveling to offshore drilling platform accessible only by boat or sea-plane found covered by pre-1972 LHWCA). The court of appeals, therefore, correctly concluded that he retained that coverage under the amended Act.[6]

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[6]Petitioners contend (Pet. 8-9) that Ward cannot meet the status test because fish spotter piloting is not included within the list of occupations in 33 U.S.C. 902(3). But the court of appeals correctly noted that the list of occupations in 33 U.S.C. 902(3) was not intended to be exclusive: " 'we understand the word 'including' to indicate that 'longshoring operations' comprise a part of the *larger group of activities that make up maritime employment*' " (Pet. App. A-6, quoting *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-78 n.7 (1979) (emphasis added)).

2. There is no reason to hold this case pending the outcome of *Perini*. Even if the court of appeals erred in concluding that the amended LHWCA preserves the Act's traditional coverage of amphibious workers, coverage is still appropriate in this case. The court below correctly held that employment as a fish spotter pilot fully satisfies the restrictive "navigation and commerce" status test because such employment possesses a "significant relationship to maritime activities involving navigation and commerce over navigable waters" (Pet. App. A-6). As the court of appeals indicated, "[b]efore the advent of the aircraft, the fish-spotting function was performed by a member of the vessel's crew. Indeed, during inclement weather, spotting is still done from the ship" (Pet. App. A-6). Ward's work, therefore, was essential to the function of fishing vessels, and was fundamentally maritime in nature.[7] This conclusion, based on an unusual fact situation, does not conflict with the decision of any other court and does not merit further review.

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[7]Cf. *Ledoux* v. *Petroleum Helicopters, Inc.*, 609 F. 2d 824 (5th Cir. 1980) (per curiam). (crash of helicopter used to transport personnel and supplies to offshore drilling structures bears significant relationship to traditional maritime activity); *Hornsby* v. *Fish Meal Co.*, 431 F. 2d 865 (5th Cir. 1970) (admiralty jurisdiction established when two fish-spotter aircraft collided and crashed into Gulf of Mexico).

3. Petitioners finally argue that Ward was "a member of the crew of a vessel" (Pet. 13) barred from coverage under the crew-member exclusion of Sections 2(3) and 3(a) of the Act, 33 U.S.C. 902(3) and 903(a). The court of appeals correctly resolved this issue. The crew member exclusion of the LHWCA is designed to preserve traditional maritime remedies for Jones Act seamen (Pet. App. A-8). As the court below explained (Pet. App. A-8 to A-9), "a plane is not a vessel under the Jones Act" and a pilot is, therefore, not a Jones Act seamen within the scope of the crew-member exclusion of the LHWCA. Accord, *Smith* v. *Pan Air Corp., supra*, 684 F.2d at 1112. Moreover, even if a plane were considered a vessel, Ward could not satisfy the three-part test for employees falling within the crew-member exception. That test requires: (1) that there be a vessel in navigation; (2) that the worker have a more or less permanent connection with the vessel; and (3) that the worker be aboard the vessel primarily to aid in navigation. See, e.g., *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976); *Offshore Co.* v. *Robison*, 266 F.2d 769, 775 (5th Cir. 1959). The dissenting judge on the Benefits Review Board correctly pointed out that "the decedent was certainly not aboard a fishing vessel in any sense of the word, and it is beyond serious dispute that the decedent was not connected with a particular boat in any

sense other than to assist all of the vessels in catching the fish. Furthermore, * * * the decedent was responsible only to the Chief Spotter Pilot and not to anyone aboard the fishing vessels" (Pet. App. A-33 to A-34).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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